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Judicial Termination of Treaty Water Rights: The Snake River Case

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Judith V. Royster; Mary Christina Wood, Judicial Termination of Treaty Water Rights: The Snake River Case

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JUDICIAL TERMINATION OF TREATY WATER RIGHTS: THE SNAKE RIVER CASE

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I. INTRODUCTION

Idaho's Snake River Basin Adjudication (SRBA) will have a profound influence on Idaho's future: the SRBA court is now in the process of adjudicating the water right claims in nearly ninety percent of the state.[1] Since most of the Snake River — the largest tributary of the Columbia River — is located within Idaho, the SRBA will also have a substantial effect on the entire Pacific Northwest. That effect will not be limited to the region's human populations: fish and wildlife will also be affected by the court's decisions. The stakes thus are high not only for the state's agricultural and municipal diverters, but also for federal lands[2] and Indian tribes — since federal and Indian reserved water right claims are subject to state, basin-wide adjudication[3] — and for the Columbia Basin's resident and migratory populations of fish and wildlife.

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1. *See* THE SNAKE RIVER BASIN ADJUDICATION REFERENCE 8 (Randy Stapilus ed., 1999).

2. *See* BUREAU OF LAND MANAGEMENT, U.S. DEPT. OF THE INTERIOR, PUBLIC LAND STATISTICS 1998 Table 1-3 (1999) (reporting that the federal government owns 62.328% of the total acreage of the state).

3. *See infra* note 25.

Thus far, the SRBA court has upheld federal stockwater claims on Bureau of Land Management lands,[4] allowed the United States Forest Service to prove that maintenance of stream channels within national forests requires instream flows,[5] and denied water rights for the Deer Flat National Wildlife Refuge.[6] But the SRBA court has also held that the federal government had a reserved water right to all of the unappropriated water within three wilderness areas and to all of the unappropriated water originating within the Hells Canyon Recreation Area.[7] The Idaho Supreme Court affirmed the latter decision,[8] prompting howls of protest from water diverters and an editorial in *The Idaho Statesman* suggesting that the opinion's author should not be reelected.[9] Federal reserved water rights are, to say the least, a highly contentious issue in the state.

However contentious the issue of water rights for federal wilderness areas is, reserved water rights for the Nez Perce Tribe loom even larger. The tribe's claims are substantial in scope and early in time. The Nez Perce Treaty of 1855[10] reserved a right to harvest fish at all usual and accustomed places — many of which, such as Celilo Falls, were not in the territory ceded by the tribe.[11] This right was carefully reserved in a subsequent treaty, and an agreement authorizing the sale of "surplus lands" on the reservation never mentioned the tribe's

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4. *See In re* SRBA, No. 39576, Subcase No. 72-15929C (Idaho Dist. Ct., Apr. 15, 1998).

5. *See In re* SRBA, No. 39576, Subcase No. 63-25243 (Idaho Dist. Ct., Dec. 22, 1998).

6. *See In re* SRBA, No. 39576, Subcase No. 02-10063 (Idaho Dist. Ct., Dec. 31, 1998).

7. *See In re* SRBA, No. 39576, Subcase No. 75-13316 (Idaho Dist. Ct., July 27, 1998).

8. *See In re* SRBA, No. 39576, 1999 WL 778325 (Idaho, Oct. 1, 1999).

9. *See* Editorial, *Idahoans Could Place Water Rights Issue in Their Hands*, IDAHO STATESMAN, Oct. 14, 1999, at 6B. *See also* Mark Warbis, *Tempers run hot over high court's recent rulings*, IDAHO STATESMAN, Mar. 13, 2000, at 1B. The Statesman's coverage has verged on hysteria from the beginning. The initial report on the case was splashed across four columns on the front page and occupied nearly a full page in the interior of the first section. The report was headlined: "Court ruling could siphon Idahoans' water rights: If decision holds, thousands may lose water for homes, farming, business." Rocky Barker, *Court ruling could siphon Idahoans' water rights*, IDAHO STATESMAN, Oct. 10, 1999, at 1A.

10. The Nez Perce Treaty was entered into on June 11, 1855, but not ratified by the U.S. Senate until 1859. *See* Treaty between the United States of America and the Nez Perce Indians, June 11, 1855, 12 Stat. 957 (1859) [hereinafter Treaty of 1855].

11. The Nez Perce's pre-contact territory centered on the middle Snake and Clearwater rivers and the northern portion of the Salmon River in what is now Idaho, Oregon, and Washington. *See* Deward E. Walker, *Nez Perce*, *in* 12 HANDBOOK OF NORTH AMERICA INDIANS: PLATEAU 420, 421 (1998). Celilo Falls was located at the current site of The Dalles, Oregon before it was inundated by The Dalles Dam.

fishing rights.[12] The reserved fishing right has been construed broadly by the federal judiciary over the intervening century and a half: it has been held to include a right of access even across private lands to reach the accustomed fishing places,[13] to prevent state regulations that discriminate against tribal fishers,[14] and to include a share of harvestable fish.[15] The tribe's claim is that it also necessarily includes some amount of water, because fish need water.

Unlike wilderness water rights, which cannot have a priority date before 1964, the tribe's priority date will be either the treaty date or "time immemorial." Thus, the tribal rights will be the senior rights throughout the Snake River Basin.[16] Moreover, because the Nez Perce claims are located along the lower reaches of the Snake River in Idaho, their early priority date could affect virtually every upstream diverter in the state.

It is therefore understandable that the SRBA court's ruling on the Nez Perce Tribe's off-reservation water rights was a much-anticipated, even a dreaded decision. And the November 1999 decision, handed down by the SRBA's new presiding judge, Barry Wood, while everything for which the water diverters could dare hope, confirmed the worst fears of the tribe and the federal government.[17] The opinion entirely denied the existence of off-reservation water rights — a startling departure from case law and the settled principles of Indian law jurisprudence.[18]

This article examines the SRBA court's opinion on the Nez Perce claims and its ramifications. Unfortunately, although Judge Wood articulated the basis of reserved water rights law fairly accurately, he misapplied that law at nearly every turn. In particular, the SRBA court misunderstood the purpose of the 1855 Treaty with the Nez

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12. *See infra* notes 68-70 (discussing express reservation of fishing rights in 1863 treaty) and 159 (noting the 1893 agreement's silence on fishing rights) and accompanying text.

13. *See* United States v. Winans, 198 U.S. 371, 381 (1905); *see also* discussion *infra* notes 37-39, 77-78, 86-87 and accompanying text.

14. *See* Department of Game v. Puyallup Tribe, 414 U.S. 44, 48-49 (1973) [hereinafter *Puyallup II*]; *see also* discussion *infra* notes 92-93 and accompanying text.

15. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979) [hereinafter *Passenger Fishing Vessel*]; *see also* discussion *infra* notes 44-47, 70, 94-107 and accompanying text.

16. *See, e.g.*, United States v. Adair, 723 F.2d 1394, 1414-15 (9th Cir. 1983) (distinguishing treaty date reserved water rights for irrigation from "time immemorial" reserved water rights for fish).

17. *In re* SRBA, No. 39576, Subcase No. 03-10022 (Idaho Dist. Ct., Nov. 10, 1999) [hereinafter Slip op.].

18. *See id.*

Perce,[19] misconstrued a 1979 Supreme Court decision affirming the tribe's treaty right to half of the harvestable salmon destined to pass its historic fishing grounds,[20] repeated errors made by the Idaho federal district court concerning the nature of the tribe's proprietary interest,[21] erroneously concluded that the tribe's reserved water rights were limited to off-reservation fishing rights,[22] and completely ignored a 1999 U.S. Supreme Court decision that off-reservation rights are not terminated by cession of "surplus" reservation lands to the federal government.[23] For these and other reasons discussed below, the Nez Perce decision should be reversed by the Idaho Supreme Court.

We begin with an explanation of Judge Wood's decision and his reasoning. This explanation is followed by a discussion of: (1) the flaws in the opinion's approach to determining the intent of the treaty; (2) the court's misinterpretation of a 1979 Supreme Court decision upholding the Nez Perce treaty fishing right; (3) its failure to comprehend treaty fishing as a property right; (4) the cases which indicate that the tribe's water right is not limited to on-reservation lands; and (5) the SRBA court's disregard of the Supreme Court's 1999 ruling that off-reservation usufructuary rights are not terminated by land cessions to the federal government. Finally, we conclude that the SRBA decision fails to justify the confidence that Justice Brennan expressed in *Arizona v. San Carlos Apache Tribe*,[24] that state courts, operating pursuant to the McCarran Amendment, could faithfully and fairly apply the law of federal reserved water rights to Indian tribes that are unwillingly subjected to state jurisdiction.[25]

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19. Article 3 of the Treaty of 1855 provides: "The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians, as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory . . . ." Treaty of 1855, 12 Stat. 957, 958 (1859).

20. *See Passenger Fishing Vessel*, 443 U.S. 658 (1979).

21. *See* Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791 (D. Idaho 1994); *see also* discussion *infra* notes 109-12 and accompanying text.

22. *See infra* Part VI.

23. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); *see also* discussion *infra* notes 169-81 and accompanying text.

24. 463 U.S. 545 (1983).

25. *See id.* at 571. *See also* Department of Justice Appropriation Act of 1953, ch. 495, 66 Stat. 556, 570 (codified at 43 U.S.C. § 666 (1994)). The McCarran Amendment was a rider to the Act, waiving the federal government's sovereign immunity in state suits determining the water rights of all users in a basin. *See* Michael C. Blumm, *Reserved Water Rights*, *in* 4 WATERS AND WATER RIGHTS § 37.04(a)(1), at 273 (Robert E. Beck ed., 1996).

II. THE SRBA COURT DECISION

The November 1999 decision reflected a basic understanding of the concept of reserved rights and the canons of treaty interpretation,[26] but failed to apply those principles to the Nez Perce claim. The court noted that the tribe's water rights spring not from a land reservation by the federal government, but from rights the tribe reserved in lands ceded to the federal government.[27] Most courts recognizing this distinction have concluded that a tribe's reservation of pre-existing rights in a treaty creates a "time immemorial" right.[28] Judge Wood, however, departed from this rule by holding that the reserved treaty right to fish on ceded lands had no accompanying water right.[29] The court apparently concluded that, in order for water to be reserved, it had to be implied in a reservation of land. Since the tribe ceded the land, no water was reserved, according to this view.[30] The fact that the Nez Perce treaty expressly reserved off-reservation treaty fishing rights, and that these rights were central to the bargain that induced the tribe to convey some 6.5 million acres of land to the United States,[31] was not significant in the court's opinion. The only

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26. *See* Slip op., *supra* note 17, at 24-27. On January 21, 2000, Judge Wood reaffirmed his November 10 opinion in response to a federal request to amend the earlier judgment. *See In re* SRBA, Case No. 39576, Subcase No. 03-10022, (Idaho Dist. Ct., Jan. 21, 2000). Following Judge Wood's decision, the United States moved to alter or amend the judgment to clarify that the grant of summary judgment did not include a ruling on the diminishment of the Nez Perce Reservation, or in the alternative, to allow the government the opportunity to submit testimony and documentary evidence on the diminishment issue. *See id.* at 1-2. The SRBA court denied both motions. *See id.* at 29. Despite his admission that a ruling on diminishment was not necessary to a determination of whether the Nez Perce Tribe reserved off-reservation water rights to support its fishery, Judge Wood nonetheless insisted that the finding of diminishment was not dicta. *See id.* at 6-7. In addition, the court held that because it had "read and reviewed a significant amount of historical documents included in the affidavits submitted by the various counsel," there was no reason to afford the government an evidentiary hearing on the issue, *id.* at 12, despite the government's assertion that it did not understand that diminishment was a question properly before the court on the motions for summary judgment. *See id.* at 6.

27. *See* Slip op., *supra* note 17, at 38.

28. *See, e.g.*, United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983); Joint Bd. of Control of the Flathead, Mission & Jocko Irrig. Dists. v. United States, 832 F.2d 1127, 1131 (9th Cir. 1987); *See* State *ex rel.* Reynolds v. Aamodt, 618 F. Supp. 993, 1009 (D.N.M. 1985); Globe Equity Decree at 86, United States v. Gila River Irrig. Dist., No. 59 (D. Ariz., June 29, 1935) (cited in Blumm, *supra* note 25, § 37.02(b), at 241 n.168); State *ex rel.* Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 712 P.2d 754, 764 (Mont. 1985); Washington v. Acquavella, No. 77-2-01484-5, at 61 (Wash. Sup. Ct., Oct. 22, 1990).

29. *See* Slip op., *supra* note 17, at 38.

30. *See id.* at 39-40.

31. *See id.* at 17. In the 1863 Treaty of Lapwai, ratified by the Senate in 1867,

point that seemed to matter to the court was that these were off-reservation rights. Since Judge Wood declared that the reserved rights doctrine was restricted to reservation lands, he denied the tribe's off-reservation water claims.[32]

The decision also relied heavily on Judge Wood's repeated assertion that the treaty negotiators intended no reservation of water when they reserved the fishing right.[33] The SRBA court seemed to require a *specific* intent to reserve water — precisely the kind of intent that the Supreme Court did *not* require when it established the reserved water rights doctrine in *Winters v. United States*,[34] and has not required since. Instead, the Supreme Court has looked to the purposes of the treaty and has asked whether water is necessary to satisfy those purposes.[35] In *Winters*, for example, the Court implied a reservation of water in the intent to create a new agricultural way of life for the tribe – not because the treaty itself contained any evidence of direct intent to reserve water.[36] In *United States v. Winans*,[37] a contemporaneous Supreme Court decision construing the fishing right in another Stevens Treaty,[38] the Court followed a similar reasoning: although the treaty revealed no specific intent to reserve easements across land to reach fishing places, the Court had no difficulty implying such easements based on the treaty's intent to preserve a way of life that centered on fishing.[39]

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the tribe ceded an additional 6 million acres of land to the United States, but again reserved its fishing rights. *See* Treaty between the United States of America and the Nez Perce Tribe, June 9, 1863, 14 Stat. 647 (1867).

32. *See* Slip op., *supra* note 17, at 40, 47.

33. *See id.* at 27, 30-32, 37.

34. 207 U.S. 564, 576 (1908); *see also* Blumm, *supra* note 25, § 37.01(b)(2), at 225.

35. *Winters*, 207 U.S. at 576.

36. Noting the importance of the Fort Belknap Treaty to the decision in the case, the Court wrote:

> The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government.

Id. at 576.

37. 198 U.S. 371 (1905).

38. *See* Treaty between the United States of America and the Yakama Tribe, June 9, 1855, 12 Stat. 951 (1859).

39. *See id.* at 381.

The simple fact that the Stevens treaties sought to preserve a way of life centered on fishing — and that fish need water — failed to impress the SRBA court. According to the court, the purpose of the Nez Perce Treaty was instead to open up lands for settlement.[40] As a result, it would "def[y] reason to imply the existence of a water right that was both never intended by the parties and inconsistent with the purpose of the Treaty."[41] Therefore, the SRBA court stated, it was "inconceivable that either the United States or the Tribe intended or even contemplated that the Tribe would remain in control of the water."[42] The court refused to interpret the treaty to protect the water flows necessary for fish habitat because "at some point only so many interpretations can be exacted from the Treaty language. It is also a canon of treaty interpretation that Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice."[43]

The SRBA court claimed support for this restrictive interpretation in what it considered to be the "settled legal meaning" of the Supreme Court's most recent interpretation of the Stevens treaties: the 1979 decision in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*.[44] Judge Wood supported his conclusion by noting that nothing in the Supreme Court's opinion indicated that the treaty right entitled the tribes to more than an access to their historic fishing grounds or a proportionate share of the fish harvests.[45] This interpretation is an example of the inconsistencies that plague the decision. For example, the SRBA court saw no problem in stating, on one hand, that "because of the abundance of fish at the time the treaty was executed, neither party to the treaty contemplated a need for future regulation or allocation,"[46] while in other parts of its opinion also acknowledging that the Supreme Court had previously sanctioned state regulation, and had held that the treaties implicitly allocated a share of the harvest.[47] Judge Wood offered no explanation for

40. *See* Slip op., *supra* note 17, at 38 ("The purpose of the Stevens Treaties was to resolve the conflict which arose between the Indians and the non-Indian settlers as a result of the Oregon Donation Act of 1850 which vested title to land in settlers. . . .[O]ne of the admitted purposes of the Treaty was to extinguish aboriginal title to make the lands available for settlement . . . .")

41. *Id.*

42. *Id.*

43. *Id.* at 39 (citing Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943)).

44. *Id.* at 30 (relying on *Passenger Fishing Vessel*, 443 U.S. 658 (1979)).

45. *See id.* at 31-33. The court also thought it significant that the proportionate harvest share that the Supreme Court found implied in the Stevens treaties was phrased in terms of a maximum rather than a minimum share. *See id.* at 31.

46. *Id.* at 31.

47. *See Passenger Fishing Vessel*, 443 U.S. at 677-78, 682, 686 (noting a 50

these results in light of the lack of intent that he found determinative on the water right issue.

Also central to the SRBA court's decision was its conclusion that the treaty created no property rights. This result obtained, in Judge Wood's view, because the treaty guaranteed the tribe only a proportionate harvest share, not "an absolute right to a predetermined or consistent level of fish."[48] The fluctuating nature of the fishery, the court reasoned, rendered the harvest right inherently uncertain and made it unnecessary to imply a reserved water right to maintain the fish.[49]

The SRBA court emphasized the limited nature of the treaty fishing right by noting two points: first, that state conservation regulations may curtail the scope of the harvest right;[50] second, that an earlier decision by the federal district court of Idaho had concluded that the Nez Perce Tribe had no ownership rights in fish as a result of the treaty – thus permitting Idaho Power Company to operate the dams that destroyed fishing sites and fish without paying damages.[51]

The SRBA court distinguished the several cases in which courts have implied water rights to fulfill the fishing purpose of a treaty, statute, or executive order,[52] as either on-reservation cases or as cases not implicating the Stevens treaties' "fishing in common" language.[53] Even apart from a factual error,[54] and the fact that another case did indeed involve fishing rights that survived the termination of a reservation and were thus were no longer appurtenant to reservation lands,[55] reserving off-reservation water to fulfill an implied agricultural purpose[56] hardly seems more compelling than reserving off-reservation water to fulfill an express, bargained-for fishing right.

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percent harvest share); Puyallup Tribe v. Department of Game, 391 U.S. 392, 398 (1968) [*hereinafter Puyallup I*]; Tulee v. Washington, 315 U.S. 681, 685 (1942) (authorizing state regulation of the treaty right).

48. Slip op., *supra* note 17, at 33. The court's line of reasoning suggested that water rights also are not property rights because — as with fish — the fluctuating nature of the resource precludes "an absolute right to a predetermined or consistent [amount of water]." *Id.*

49. *See id.*

50. *See id.* at 34-35.

51. *See id.* at 34-37 (citing Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791 (D. Idaho 1994)).

52. *See* cases cited *supra* note 28. The *Aamodt* and *Gila River* cases involved reserved water rights for irrigation rather than fish.

53. Slip op., *supra* note 17, at 39.

54. One of the cases the court attempted to distinguish did involve the Stevens treaty "in common" language and an off-reservation right. *See* Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist., 763 F.2d 1032 (9th Cir. 1985); *see also infra* note 154.

55. *See* United States v. Adair, 694 F.2d 1394 (9th Cir. 1983).

56. *See, e.g.*, Arizona v. California, 373 U.S. 546, 595-96, 600-01 (1963).

Finally, the SRBA court's decision rested on a conclusion that an 1893 agreement – incorporated into an 1894 statute, in which the Nez Perce agreed to a "'present and total surrender of all tribal interests'" except as reserved by the agreement – eliminated any possibility of reserved water rights.[57] According to the court, under the Supreme Court's 1998 decision in *South Dakota v. Yankton Sioux Tribe*,[58] the 1893 agreement had the effect of diminishing the boundaries of the Nez Perce reservation.[59] The court viewed this "diminishment" as significant — even though the *Yankton Sioux* case concerned a question of tribal sovereignty[60] rather than a property right — because of the court's earlier determination that only reserved lands possessed reserved water rights.[61] Therefore, according to the court, the diminishment of the reservation eliminated reserved water rights — even though the 1893 agreement contained a savings clause in which the tribe had retained its off-reservation fishing rights, the legal basis for its reserved water rights.[62] The court made no mention of the Supreme Court's more recent decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*,[63] in which the Court held that reserved off-reservation hunting and fishing rights survived an unconditional cession of lands quite similar to the 1893 agreement with the Nez Perce.[64]

Judge Wood's decision therefore denied the existence of any water rights appurtenant to the Nez Perce Tribe's off-reservation fishing grounds. Although he did not decide the tribe's on-reservation water claims,[65] those claims would disturb few state water rights. The tribe's off-reservation claims, however, involve the Snake River, implicating nearly all state-granted water rights in Idaho. If upheld on appeal, the opinion will lift a cloud on water titles that threatened most water development in the state. Although the result is what every water developer in the state had hoped for, the SRBA court's opinion should not survive an appeal to the Idaho Supreme Court.

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57. Slip op., *supra* note 17, at 44 (quoting Articles I-III of the 1893 Nez Perce agreement).

58. 522 U.S. 329 (1998).

59. *See* Slip op., *supra* note 17, at 46 (relying on *Yankton Sioux*, 522 U.S. 329).

60. The tribal sovereignty issue in *Yankton Sioux* involved the tribe's ability to regulate a landfill on what it thought was reservation lands. *Yankton Sioux*, 522 U.S. at 333.

61. Slip op., *supra* note 17, at 39-40.

62. *See id.* at 46.

63. 526 U.S. 172 (1999).

64. *See id.*

65. *See* Slip op., *supra* note 17, at 12, 40, 46, 47.

III. THE PURPOSE OF THE NEZ PERCE TREATY

According to Judge Wood, the purpose of the Stevens Treaties, including the Nez Perce treaty, "was to resolve the conflict which arose between the Indians and the non-Indian settlers as a result of the Oregon Donation Act of 1850 which vested title to land in settlers."[66] Although this may indeed have been one intent of the United States negotiators, a treaty is the product of the intent of at least two parties, and rules of Indian treaty interpretation counsel that "Indian treaties must be interpreted as the Indians themselves would have understood them."[67]

The intent of the tribes in the negotiations leading to the Stevens Treaties was to reserve a homeland and off-reservation hunting, fishing, and gathering rights.[68] This was also clearly the intent of Governor Stevens himself. At the Treaty of Point No Point, another 1855 treaty containing reservations of similar hunting, fishing, and gathering rights, he stated:

> Are you not my children and also children of the [G]reat Father? What will I not do for my children and what will you not do for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? This paper you a school[.] Does not a father send his children to school? It gives you mechanics and a Doctor to teach and cure you. Is that not fatherly? *This paper secures your fish*[.] Does not a father give food to his children? Besides fish you can hunt, gather roots and berries.[69]

The Supreme Court relied on statements like Governor Stevens' when it concluded in 1979 that "[i]t is perfectly clear . . . that the Indians were vitally interested in protecting their right to take fish at usual and accustomed places . . . and that they were invited by the white negotiators to rely and in fact did rely heavily on the good faith

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66. *Id.* at 38.

67. *Id.* at 25, (citing *Passenger Fishing Vessel*, 443 U.S. 658, 676 (1979)); *see also Mille Lacs*, 526 U.S. at 196 (citing the canons of construction).

68. *See* Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 426-33 (1998).

69. OFFICE OF INDIAN AFFAIRS, DIV. OF FORESTRY & GRAZING, U.S. DEPT. OF THE INTERIOR, REPORT ON THE SOURCE, NATURE AND EXTENT OF THE FISHING, HUNTING, AND MISCELLANEOUS RIGHTS OF CERTAIN INDIAN TRIBES IN WASHINGTON AND OREGON 348 (July 1942) (compiled by Edward G. Swindell, Jr., later Regional Solicitor, Department of the Interior) (emphasis added).

of the United States to protect that right."[70] Not surprisingly, the SRBA court ignored the statements of both Governor Stevens and the Supreme Court.

Instead, the court chose to emphasize the treaty purpose of extinguishing aboriginal title, while ignoring the rights the tribes reserved in the treaty in exchange for conveying 6.5 million acres of their land.[71] Consequently, the court decided that it was "inconceivable that either the United States or the Tribe intended or even contemplated that the Tribe would remain in control of the water."[72] The SRBA court's skepticism was a consequence of its apparent belief that the treaty's purpose was to enable lands "to be developed and irrigated by non-Indian settlers."[73] This purpose appears nowhere in the treaty or in the treaty negotiations, however, and the court did not cite any authority for this non-Indian irrigation treaty purpose. Indeed, no other court has ever interpreted the purpose of an Indian treaty to include the promotion of non-Indian irrigation. Under the reserved rights doctrine, water is reserved to fulfill the purposes of the treaty for the benefit of the *tribes*. Non-Indian purposes are thus irrelevant to the reserved rights doctrine.[74]

Ultimately, Judge Wood's approach contradicted one of the most settled principles of Indian law: rights not expressly granted in a treaty are reserved to the Indians.[75] The SRBA court instead turned the reserved rights doctrine on its head by interpreting the treaty as a relinquishment of water rights on the ground that there was no *expressly* evidenced intent to reserve a water right.[76] This interpretation fundamentally shifted the burden of demonstrating reserved tribal rights and is contrary to the Supreme Court's ruling in *United States v. Winans*.[77] As the Supreme Court stated in interpreting the Stevens fishing clause to allow implied access over private lands to usual and accustomed fishing sites:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exer-

70. *Passenger Fishing Vessel*, 443 U.S. at 667.

71. *See* Slip op., *supra* note 17, at 38-39.

72. *Id.* at 38.

73. *Id.*

74. *See* Cappaert v. United States, 426 U.S. 128, 138-39 (1976) (rejecting a "balancing of competing interests" test for determining the existence of reserved water rights in favor of governmental intent to reserve unappropriated waters).

75. United States v. Winans, 198 U.S. at 381. *See also* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 221-25 (1982).

76. Slip op., *supra* note 17, at 37.

77. 198 U.S. 371 (1905).

> cise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. . . . Only a limitation of [those aboriginal rights], however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted.[78]

Given the amount of land received by the United States in the Stevens treaties, the determination of the tribes to reserve their fishing livelihoods, and the rule of interpretation — recognized but ignored by the SRBA court[79] — that any rights not expressly granted by the tribes to the United States are retained by them, it is not clear how the court could conclude that "it defies reason" to imply the existence of reserved water necessary to maintain their fishing rights.[80] Nor is it clear why the court thought the alleged scope of the water right – which the court recognized was beyond the scope of its decision[81] – was relevant to the question of whether there was an implied water right for fish. Yet the court believed that pointing out the potential scope of the right was "helpful" in determining its existence,[82] perhaps so that the Idaho and United States Supreme Courts would not miss the point. In this respect, the court's opinion resembles an advocate's brief more than a dispassionate judicial opinion.

IV. THE MEANING OF THE *PASSENGER FISHING VESSEL* DECISION

Judge Wood's opinion recognized that the Supreme Court's decision in *Passenger Fishing Vessel* was critical to the Nez Perce water rights claim. He acknowledged the Supreme Court's determination that the fishing provision of the treaties was of "vital importance" to all of the Stevens Treaty tribes.[83] He also noted that the parties to the treaties never contemplated that the treaty fishing right

> would be impeded by subsequent technology (fishing wheels), property law concepts (right of access), or regulation (conservation laws) at the time the treaty was being negotiated. Likewise, the parties to the 1855 Nez Perce Treaty did not intend to reserve an instream flow water right because neither

78. *Id.* at 381; *see also* COHEN'S HANDBOOK, *supra* note 75, at 444.
79. *See* Slip op., *supra* note 17, at 24.
80. *See id.* at 38.
81. *See id.*
82. *See id.*
83. *See id.* at 31 (citing *Passenger Fishing Vessel*, 443 U.S. 658, 667 (1979)).

> party to the Treaty contemplated a problem would arise in the future pertaining to fish habitat.[84]

What Judge Wood did not acknowledge, however, was that, despite this lack of specific intent, the Supreme Court has repeatedly ruled that the treaties protect tribal fishing against new technologies, property law concepts, and state regulations.[85] In short, the lack of specific intent which the SRBA court found decisive on the water right claim has been treated as irrelevant by the Supreme Court.

In *United States v. Winans*,[86] the Court determined that the treaty fishing right included an implied right of access across privately owned lands as well as a right to fish at historic fishing grounds despite the state's grant of a license giving monopoly rights to operate a fishwheel.[87] In *Seufort Brothers v. United States*,[88] the Court extended the *Winans* holding to lands that had not been ceded in the relevant treaty.[89] In *Tulee v. Washington*,[90] the Court exempted tribal harvesters from state license fees.[91] And in *Puyallup v. Department of Game (Puyallup II)*,[92] the Court held that facially nondiscriminatory state conservation regulations would be illegal if they in fact impermissibly discriminated against tribal fishing.[93]

Thus, at the time the dispute in *Passenger Fishing Vessel* reached the Supreme Court, the treaty fishing right had been interpreted to include an implied affirmative easement to access historical fishing grounds (even across private property) and a negative servitude preventing a state from burdening tribal harvests with license fees or discriminatory regulations.[94] In *Passenger Fishing Vessel*, the Supreme Court went a significant step further: the Justices determined that implied in the treaty fishing right was an affirmative right to harvest up to fifty percent of the available fish.[95] Noting that the treaties promised the tribes something more than a right to dip their nets into the territorial waters and come up empty, the Court rea-

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84. *Id.* at 32-33.
85. *See* Blumm & Swift, *supra* note 68, at 435-62 (discussing cases).
86. 198 U.S. 371 (1905).
87. *Id.* at 381.
88. 249 U.S. 194 (1919).
89. *Id.* at 198-99.
90. 315 U.S. 681 (1942).
91. *Id.* at 681.
92. 414 U.S. 44 (1973).
93. *Id.* (clarifying the rule laid down in *Puyallup I*, 391 U.S. 392, 398 (1968), where the Court held that the state could regulate the treaty in the interest of conservation, provided that the regulation did not discriminate against tribal harvests).
94. *See supra* notes 86-93.
95. *See Passenger Fishing Vessel*, 443 U.S. at 658, 686 (1979).

soned that, without this apportionment, the state could impermissibly regulate fishing to crowd out the tribes from their reserved fishery.[96] Thus, the Supreme Court's decisions have consistently expanded the servitude implied in the treaties in order to fulfill the overriding purpose of protecting the tribes' right to fish.[97]

The SRBA court ignored this history, stating that "[n]owhere in [*Passenger Fishing Vessel*] is a water or other property right greater than an access or allocation right mentioned for purposes of giving effect to the fishing right . . . ."[98] In other words, the court reasoned that because the Supreme Court had not determined that the fishing right included an implied water right, it would refuse to acknowledge such a right. The Supreme Court, however, had not been presented with any water rights issues.[99] Therefore, when the Supreme Court addressed the scope of the fishing right in *Passenger Fishing Vessel*, its review was limited to the allocation issue; neither the remaining hatchery or environmental issues were before the Court. In fact, the Supreme Court affirmatively declined to review issues which had been reserved for decision in the trial court.[100] The SRBA court's ap-

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96. *See id.* at 678-79 ("Because the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish . . . they would be unlikely to perceive a 'reservation' of that right as merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters.")

97. *See supra* notes 86-93, 95-96.

98. Slip op., *supra* note 17, at 33.

99. As originally filed, the *United States v. Washington* litigation included three sets of issues: (1) whether the treaty fishing clause entitled the tribes to a specific allocation of fish (the "allocation" issue); (2) whether, if allocation were required, hatchery fish were included within the allocation (the "hatchery" issue); and (3) whether the right to take fish includes a right to have treaty fish protected from environmental degradation (the "environmental" issue, which includes the water rights issue). *See* United States v. Washington, 506 F. Supp. 187, 190 (W.D. Wash. 1980) [hereinafter *Washington Phase II*] (describing the litigation which originally had commenced in 1970).

The parties agreed to litigate the case in two phases. The first phase involved only the allocation issue and eventually resulted — after a series of related trial and appellate court decisions — in the Supreme Court's *Passenger Fishing Vessel* decision. *See id.* at 191; *see also United States v. Washington*, 384 F. Supp. 312, 328 (W.D. Wash. 1974) [hereinafter *Washington Phase I*] (approving parties stipulation to defer environmental issues until after trial on the allocation issue). *Washinton Phase II* involved the hatchery and environmental issues which had been reserved for litigation in the trial court until after the final resolution of *Washington Phase I* allocation issues. *See Washington Phase II*, 506 F. Supp. at 191.

100. *See Passenger Fishing Vessel*, 443 U.S. at 689 n.30. The Court stated:

> Although there is some discussion in the briefs concerning whether the treaties give Indians the same right to take hatchery-bred fish as they do to take native fish, the District Court has not yet reached a final decision on the issue, and it is not therefore fairly subsumed within our grant of certiorari.

proach of considering a case as binding authority on an issue it did not even address represents a novel method of applying precedent — one which offends accepted jurisprudence and depletes the precedent of any meaning.

The SRBA court also placed great emphasis on the fact that the *Passenger Fishing Vessel* Court established the fifty percent harvest share as a maximum rather than a minimum. For the court, this meant that the "fishing right is a limited, rather than an absolute guarantee or entitlement."[101] Because Judge Wood found that "[i]mplicit in the [Supreme Court's] ruling is the recognition the fish runs will vary or even be subject to shortages," he concluded that a water right was unnecessary "for maintenance of fish habitat or fish propagation."[102] In short, since there was no assurance of a specific amount of fish, there was no assurance of any fish or fish habitat at all. One could use this same reasoning to deny the existence of virtually all water rights in the state, since precipitation, an inherently uncertain event, is a prerequisite to the exercise of a water right.

Moreover, this interpretation is another distortion of *Passenger Fishing Vessel*. The fifty percent maximum allocation resulted solely from the Supreme Court's interpretation of the treaty language reserving to the Indians the "'right of *taking* fish'" in common "with 'all citizens of the Territory.'"[103] The allocation reflected no assumption by the Supreme Court that fish habitat is unprotected by the treaty. And while the SRBA court emphasized naturally occurring fluctuations in fish runs to justify its conclusion that there can be no assurances of actual numbers of returning fish — and from there leapt to the further conclusion that there could be no legal protection for fish habitat — the Supreme Court in *Passenger Fishing Vessel* actually emphasized the stability of fish runs.[104] As the Supreme Court noted at the beginning of the opinion:

> The regular habits of these fish make their "runs" predictable; this predictability in turn makes it possible for both fisherman and regulators to forecast and to control the number of fish that will be caught or "harvested." Indeed, . . . the management of anadromous fisheries is in many ways more akin to the cultivation of "crops" — with its relatively high degree of

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Id. (citations omitted).

101. Slip op., *supra* note 17, at 31.

102. *Id.* at 33.

103. *Passenger Fishing Vessel*, 443 U.S. at 677-79 (quoting the treaty language).

104. *Id.* at 663.

> predictability and productive stability, subject mainly to sudden changes in climatic patterns — than is the management of most other commercial and sports fisheries.[105]

Further, the Court highlighted the stability of runs as important to the context against which the Stevens Treaty language should be interpreted. In construing the treaty language reserving the "right of taking fish," the Court pointed out:

> This language is particularly meaningful in the context of anadromous fisheries . . . because of the relative predictability of the "harvest." In this context, it makes sense to say that a party has a right to "take" — rather than merely the "opportunity" to try to catch — some of the large quantities of fish that will almost certainly be available at a given place at a given time.[106]

Moreover, the SRBA court ignored the Supreme Court's interpretation of the overriding purpose of the treaties. As the Supreme Court noted,"the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood — that is to say, a moderate living."[107] Thus, the overarching purpose of the treaties is to provide the tribes with a fishing livelihood. The Supreme Court has interpreted treaties to include affirmative access rights, negative rights against state fees and discriminatory regulations, and affirmative harvest-share rights to effectuate this purpose. It is difficult to fathom a fishing right existing without water to supply the fish with habitat to spawn, rear, and migrate.

V. THE TREATY FISHING RIGHT AS A PROPERTY RIGHT

The SRBA court's determination that the treaty fishing right is not an absolute entitlement, but instead is "essentially a right to a share of the fish harvest . . . [rather than a] guarantee to a set amount of fish," coupled with its recognition that the right is subject to state conservation regulations, led it to conclude that "[t]he Nez Perce do not have a property interest in the fish."[108] This conclusion repeats an error made by the Idaho federal district court that the SRBA court accepted as authoritative.[109]

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105. *Id.*
106. *Id.* at 678.
107. *Id.* at 686.
108. Slip op., *supra* note 17, at 37.
109. *See id.* at 35-37 (relying on Nez Perce Tribe v. Idaho Power Co., 847 F.

In *Nez Perce Tribe v. Idaho Power Co.*,[110] the federal district court concluded that, because the tribe had no ownership rights in any individual fish in a salmon run, it had no "property" entitling it to compensation for damages caused by the construction or operation of Idaho Power's three dams in the Hells Canyon reach of the Snake River.[111] The court claimed that the tribe's treaty fishing rights were not property rights because the tribe only has "an opportunity to catch fish if they are present at the accustomed fishing grounds."[112] The Supreme Court, however, has rejected the notion that the treaties gave the tribes only an opportunity to attempt to harvest fish on a nondiscriminatory basis. The Court ruled in *Passenger Fishing Vessel* that the treaty right was more than "merely the chance . . . occasionally to dip their nets into the territorial waters."[113]

Tribal fishing rights are, indisputably, property rights.[114] In 1968, in *Menominee Tribe v. United States,* [115] the Supreme Court reaffirmed the notion that treaty fishing rights are property rights by noting that their termination would require payment of constitutionally mandated "just compensation" by the government.[116] Further, nearly a century ago in the *Winans* case, the Court described the treaty right as a "servitude" — a "right in the land" burdening "every piece of land" ceded by the tribes in the Stevens Treaties.[117] This is the quintessence of a property right, giving the tribes the right to occupy and make use of lands despite the "contingency of future ownership."[118] It was an attempt to avoid the *Menominee Tribe* precedent that led the Idaho federal district court to attempt to distinguish the Menominee Tribe's fishing rights — recognized by the Supreme Court

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Supp. 791 (D. Idaho 1994)).

110. 847 F. Supp. 791 (D. Idaho 1994).

111. The tribe sought compensation under section 10(c) of the Federal Power Act. Section 10(c) makes federal licensees, such as Idaho Power Company, "liable for all damages . . . to the property of others" caused by the construction, maintenance, or operation of their projects. 16 U.S.C. § 803(c) (1994).

112. *Nez Perce Tribe*, 847 F. Supp. at 795.

113. *Passenger Fishing Vessel*, 443 U.S. 658, 679 (1979).

114. *See* Menominee Tribe v. United States, 391 U.S. 404, 406 (1968); *see also* Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988) ("The Tribes' right to take fish is a property right."); Whitefoot v. United States, 293 F.2d 658, 663 (Cl. Ct. 1961) (holding that tribal fishing rights are communally owned property rights); COHEN'S HANDBOOK, *supra* note 75, at 468 ("The Supreme Court has stated that Indian Treaty hunting and fishing rights are valuable property rights." (citing cases)).

115. 391 U.S. 404 (1968).

116. *Id.* at 413.

117. Winans v. United States, 198 U.S. 371, 381 (1905).

118. *Id.*

as property rights — from the Nez Perce Tribe's fishing rights, which the district court called merely treaty rights — perhaps entitling the tribe to compensation only from the government, but not from private parties like Idaho Power.[119] It is hard to believe that this contrived distinction would have survived an appeal to the Ninth Circuit, but the case was settled before the appeal was decided.[120]

Part of the property right recognized by the Supreme Court in *Winans* and *Menominee Tribe* consists of a profit *à prendre* — the right to go on land owned by another and remove a natural resource.[121] A right to take fish is a piscary profit *à prendre* — an interest the common law has for centuries recognized as a property right.[122] Further, the common law has long permitted parties with hunting and fishing rights to restrain those who damage these rights.[123] For example, the Supreme Court of Wisconsin recently en-

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119. *See Nez Perce Tribe*, 847 F. Supp. at 795-96.

120. The settlement called for Idaho Power to pay the tribe some $16.5 million, $11.5 of which was allocated to the settlement of the case, and $5 million of which was for the tribe's "full support" of Idaho Power's relicensing of the three hydroelectric projects that make up the Hells Canyon Complex, payable after the successful relicensing. *See* Settlement Agreement between the Nez Perce and Idaho Power Company at 6, *Nez Perce Tribe*, 847 F. Supp. 791. Subsequent to the *Nez Perce Tribe* decision, the Ninth Circuit ruled that privately owned shellfish beds were subject to the treaty fishing right, undermining the federal district court of Idaho's key assumption that the treaty fishing right did not burden private property. *See* United States v. Washington, 157 F.3d 630, 646-47 (9th Cir. 1998).

121. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES xxi (Tentative Draft No. 1, 1989) ("A profit creates the right to enter on and remove a physical substance from land in the possession of another. It imposes a duty on the owner and possessor of the land not to interfere with removal of the substance."); *see also* 8 THOMPSON ON REAL PROPERTY § 65.01(a), at 33-34 (David A. Thomas ed., 1994); 3 HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY § 839, at 427 (3d ed. 1939) ("A profit à prendre involves primarily a power to acquire, by severance or removal from anothers land, some thing or things previously constituting a part of the land . . . .).

122. *See* 8 THOMPSON, *supra* note 121, § 65.02(b), at 38 (listing piscary profits as one of the four principal kinds of common law profits); *see also* TIFFANY, *supra* note 121, § 839, at 427-28 (classifying the right to fish as a profit). Piscary profits *a prendre* were not unusual in common law England. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *34; *see also* Kennedy v. Becker, 241 U.S. 556, 562 (1916) ("We assume that [the Seneca] retained an easement [to hunt and fish], or a profit *a prendre*, to the extent defined [in the Treaty of the Big Tree of 1797] . . . ."); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 352 (7th Cir. 1983); United States v. Finch, 548 F.2d 822, 833 (9th Cir. 1977) (ruling by Judge, now Justice, Kennedy recognizing that the treaty fishing right could be characterized as a profit *à prendre*); Van Camp v. Menominee Enters., Inc., 228 N.W.2d 664, 669-70 (Wis. 1975) (recognizing a treaty right to hunt and fish as a profit *à prendre*); Grand Traverse Band of Chippewa & Ottawa Indians v. Director, Michigan Dept. of Natural Resources, 971 F. Supp. 282, 288 (W.D. Mich. 1995) (holding that treaty rights to fish are profits *à prendre*, constitutionally protected property rights).

123. *See, e.g.*, Keeble v. Hickeringill, 103 Eng. Rep. 1127, 1128 (Q.B. 1707) (ruling that the owner of a duck pond had a cause of action against another who drove

joined a development that would have destroyed hunting habitat on land subject to a recreational hunting profit *à prendre*.[124] The Nez Perce piscary profit — the purpose of which, the Supreme Court concluded, was to supply tribal members with a livelihood,[125] and which was the essential consideration for one of the largest real estate transactions in United States history — would seem to warrant no less judicial protection than a recreational hunting profit.

The SRBA court's suggestion that the tribe did not possess a property right because the state could regulate tribal fishing, while the tribe could not regulate non-tribal fishing,[126] is a curious bit of whimsy but hardly a reason that justifies the court's conclusion. State regulation of property rights for conservation purposes is commonplace.[127] In fact, it is hard to conceive of a property right that is not subject to such regulation. This does not mean that property rights do not exist, only that they are subject to regulation. Additionally, the fact that the tribes cannot regulate non-tribal fish harvests, while true, adds nothing to the argument:[128] the SRBA court confused the authority to regulate — a sovereign power — with the right to fish — a proprietary right. Whether the tribe has the sovereign power to regulate non-Indian water rights is simply irrelevant to the existence of its property rights.

Finally, like the federal district court of Idaho, Judge Wood refused to recognize the treaty fishing right as a property interest because he thought that doing so would provide the tribe with "an absolute right to the preservation of the fish runs in their original 1855

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away ducks with gunfire because "he that hinders another in his trade or livelihood is liable"); Union Oil Co. v. Oppen, 501 F.2d 558, 568 (9th Cir. 1974) (allowing an action by commercial fishers against oil companies for damages resulting from an oil spill); *see also* Allen H. Sanders, *Damaging Indian Treaty Fisheries: A Violation of Tribal Property Rights?*, 17 PUB. LAND & RESOURCES L. REV. 153, 162-67 (1996) (collecting other cases).

124. *See* Figluizzi v. Carcajou Shooting Club, 516 N.W.2d 410, 417-18 (Wis. 1994) (enjoining a four-building, 26-unit condominium complex for constituting an unreasonable interference with a hunting and fishing profit *à prendre* possessed by nineteen members of a hunting club).

125. *See id.*

126. Slip op., *supra* note 17, at 34-35.

127. *See* 8 THOMPSON, *supra* note 121, § 75, at 423-573 (discussing in detail the effect of environmental regulation on real property); RICHARD H. CHUSED, CASES, MATERIALS AND PROBLEMS IN PROPERTY 1135 (1988) ("The scope of land use regulation by federal, state and local governments is enormous.").

128. Indeed, state conservation regulation was a principal reason the Supreme Court declared that implied in the treaty fishing right was a harvest-share right of up to 50 percent, *See Passenger Fishing Vessel*, 443 U.S. 658, 686 (1979) (stating that one sovereign government with the authority to allocate harvests affecting two sovereigns was inherently unfair).

condition, free from all environmental damage."[129] Instead, the SRBA court noted that, since treaty fishing rights are "subject to outside changing circumstances," the treaty right does not guarantee that developments will not "'unfortunately'" destroy the fish runs.[130] Both courts' worries were hyperbolic: their denial of the existence of treaty property rights was therefore unnecessary. Few property rights are absolute; most are relative.[131] The treaty fishing right, as a profit *à prendre*, would not block all developments, only those that "unreasonably interfere" with its exercise.[132] Had both courts been better informed of the nature of the applicable property law, they could have avoided the distorted reasoning that characterized their decisions.

VI. OFF-RESERVATION RESERVED WATER RIGHTS

At the heart of his decision was Judge Wood's conclusion that the tribe had no off-reservation water rights.[133] The result was to remove the threat of treaty water rights for upriver Snake River irrigators – the overwhelming majority of irrigators in the state. The result may be good politics, but it is bad law. The court's opinion ignored several decisions holding that off-reservation reserved water rights may exist.

According to the SRBA court, there were actually two reasons why the Nez Perce have no water rights for their off-reservation fisheries: the decided cases finding that water had been reserved to preserve tribal fishing rights either involved on-reservation situations, or they did not involve a treaty promise of "fishing in common."[134] The court's conclusion on these points derived from a very selective reading of the case law.

The SRBA court took pains to describe *United States v. Adair*,[135] which the court appeared to consider the leading case,[136] as an on-reservation water rights case. In *Adair*, the Ninth Circuit ruled that

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129. Slip op., *supra* note 17, at 36 (citing Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791, 808 (D. Idaho 1994)).

130. *Id.* at 36-37 (quoting *Nez Perce Tribe*, 847 F. Supp. at 814)

131. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 101 (4th ed. 1998); *See also* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 4, 129 (1st ed. 1993); RALPH E. BOYER ET AL., THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY 1 (4th ed. 1991).

132. RESTATEMENT (THIRD) OF PROPERTY, § 4.9 (Tentative Draft No. 4, 1994) (endorsing the "unreasonable interference" standard, the same standard articulated in the 1944 Restatement).

133. Slip op., *supra* note 17, at 12, 40, 46, 47. The court deferred the on-reservation water rights question for a later time.

134. *Id.* at 39.

135. 723 F.2d 1394 (9th Cir. 1983).

136. *See* Slip op., *supra* note 17, at 40 (describing *Adair* as "[t]he front runner case").

the Klamath Tribe possessed "time immemorial" water rights for its treaty hunting and fishing rights, and tied the scope of the water reserved to implement the hunting and fishing rights to that amount necessary to achieve a moderate living for the tribe.[137] *Adair*, however, is an odd candidate for classification as an on-reservation case because the Klamath Reservation no longer exists, having been sold or condemned in the wake of congressional termination in 1954.[138] Although the reservation no longer exists, the Klamath Termination Act expressly preserved the tribe's hunting, fishing, and water rights on the apparent belief that those rights were not necessarily appurtenant to the reservation lands.[139] This congressional sentiment was ignored by the SRBA court, as was the fact that when the Ninth Circuit decided *Adair* in 1983, the case resembled an off-reservation case because there were no reservation lands. The court also ignored the fact that the Supreme Court has discounted differences between off-reservation and on-reservation fishing rights — at least when salmon have been at stake — stating in the *Passenger Fishing Vessel* case that "[s]hares in the fish runs should not be affected by the place where the fish are taken."[140]

Another case the SRBA court sought to distinguish was *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*.[141] In *Kittitas,* the Ninth Circuit upheld the authority of a watermaster to take measures designed to preserve salmon redds (nests) that would have been dewatered by planned flow reductions from a Federal Bureau of Reclamation dam.[142] The SRBA court noted parenthetically that the court in *Kittitas* did not decide the scope of the fishing right.[143] Although this conclusion is correct, the court ignored the following facts: (1) the case involved the Yakama Indian Nation's "fishing in common" treaty rights; and (2) the redds were not located on the Yakama reservation.[144] Thus, both grounds Judge Wood gave for distinguishing the case did not actually apply.

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137. *Adair*, 723 F.2d at 1414-15 (relying on *Passenger Fishing Vessel*, 443 U.S. 658, 686 (1979)).

138. *See* Klamath Termination Act of 1954 § 1, 25 U.S.C. § 564 (1994).

139. *Id.* § 564m; *see also Adair*, 723 F.2d at 1412.

140. *Passenger Fishing Vessel*, 443 U.S. at 687 (overruling the trial court's separate allocation for on-reservation and off-reservation harvests).

141. 763 F.2d 1032 (9th Cir. 1985), *cert. denied*, 474 U.S. 1032 (1985).

142. *See id.* at 1035.

143. *See* Slip op., *supra* note 17, at 39.

144. *See* Electronic mail from John Ogan, formerly an attorney for the Yakama Indian Nation, to Michael Blumm (Feb. 2, 2000) (noting that the redds located on the Yakima River, near Easton and Cle Elum, were 60-75 miles from the reservation boundaries).

Two other cases which Judge Wood cited, *Colville Confederated Tribes v. Walton*[145] and *United States v. Anderson,*[146] involved reservations established by executive order rather than by treaty. Although neither executive order mentioned fishing rights, the courts not only implied fishing rights from the historic dependence of the Colville and Spokane Tribes on salmon, they also determined that the implied fishing rights required implied water rights. One of the decisions involved water flows to establish replacement fish spawning grounds.[147] In the other, the court set a temperature standard to facilitate salmon spawning.[148] The SRBA court denied water rights for an express, bargained-for treaty fishing right, apparently seeing nothing inconsistent with its conclusion in these decisions — which implied reserved water rights from implied fishing rights.

Judge Wood's attempt to distinguish the Supreme Court's decision in *Arizona v. California*[149] is also problematic. In *Arizona,* the Court held that five small Indian reservations along the Colorado River possessed reserved water rights for irrigation, measured by the "practicably irrigable acreage" on their reservations.[150] As a result, these five reservations, created by executive order rather than treaty, received about one million acre-feet of water for roughly 135,000 irrigable acres of land[151] — even though the executive orders said nothing about reserving water. The SRBA court cited the case as one involving on-reservation water rights.[152] One of the reservations, however, does not border the Colorado River, so the source of its reserved rights was actually off-reservation.[153]

Thus, the cases on which Judge Wood relied to deny the Nez Perce off-reservation water rights claim actually stand for the following propositions: (1) on-reservation water rights are not appurtenant to reservations, because they can survive the termination of the reservation;[154] (2) off-reservation fishing rights can affect the operation of water projects located off-reservation;[155] (3) reserved water rights can

145. 647 F.2d 42 (9th Cir. 1981).
146. 591 F. Supp. 1 (E.D. Wash. 1982).
147. *See Colville,* 647 F.2d at 48.
148. *See Anderson,* 591 F. Supp. at 5-6.
149. 373 U.S. 546 (1963).
150. *Id.* at 600-01.
151. *See id.* at 595-96.
152. *See* Slip op., *supra* note 17, at 39.
153. The Cocopah Reservation was awarded reserved water rights in the Court's 1964 decree in *Arizona v. California.* 376 U.S. 340, 344 (1964). The reservation does not, however, border on the Colorado River. *See* Blumm, *supra* note 25, § 37.01(b)(3), at 230, n.77.
154. *See* U.S. v. Adair, 723 F.2d 1394, 1412 (9th Cir. 1983).
155. *See* Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1035 (1985).

be implied from implied fishing rights;[156] and (4) sources of reserved water rights do not have to be located on-reservation.[157] Although the express, bargained-for, off-reservation fishing rights were essential to the Northwest tribes' signing of the treaties and enabled the United States to obtain title to some sixty-four million acres of land, Judge Wood ruled that they had no reserved water. This is a deduction that an irrigation district advocate might be expected to draw, but it is surprising when it comes from a disinterested court.

VII. THE TERMINATION OF TREATY USUFRUCTUARY RIGHTS

A final, striking element of the SRBA court's opinion was Judge Wood's reliance on the 1998 Supreme Court decision in *South Dakota v. Yankton Sioux Tribe*.[158] The court concluded that an 1893 agreement between the Nez Perce and the federal government authorizing the sale of "surplus" Nez Perce reservation lands, without mentioning fishing rights, diminished the reservation.[159] According to the court, the agreement therefore terminated any fishing rights that might have existed on lands previously within the reservation.[160] Judge Wood thought the size of the reservation significant because he denied the existence of water rights for off-reservation interests.[161] To reach this conclusion, the court had to ignore a 1999 Supreme Court decision ruling that unmentioned off-reservation proprietary rights survive land cessions to the federal government.[162] The SRBA court again confused proprietary rights with sovereign powers.[163]

In *Yankton Sioux*, the tribe sought to regulate the siting of a landfill on land that had been sold to the United States as "surplus lands" and subsequently deeded to a non-Indian under a homestead act.[164] The lower courts ruled that the tribe could regulate the landfill

156. *See* Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981); United States v. Anderson, 591 F. Supp. 1, 5 (E.D. Wash. 1982).

157. *See Arizona*, 376 U.S. at 344.

158. 522 U.S. 329 (1998).

159. *See* Slip op., *supra* note 17, at 46 (relying on Act of Aug. 15, 1894, ch. 290, 28 Stat. 286).

160. *See id.* at 41-47 (relying on *Yankton Sioux*, 522 U.S. 329).

161. *See id.* at 41, 46.

162. *See infra* notes 169-81 and accompanying text.

163. *See supra* Part V.

164. *See Yankton Sioux*, 522 U.S. at 333. Under the General Allotment Act, (Dawes Act), Congress authorized the division of Indian reservation into separate parcels (allotments) for individual tribal members in order to promote agricultural pursuits. *See* Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. § 331 et seq.) (1983)). In addition, Congress authorized the sale of non-allotted, surplus lands to non-Indians. *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

because the surplus land sale had terminated the tribe's proprietary rights, but not its governmental authority over the land.[165] The Supreme Court reversed, however, holding that when Congress ratified the sale of the surplus land, it effected a diminishment of the reservation and terminated the tribe's regulatory authority over the land sold.[166] Because the statute involved in the *Yankton Sioux* case also ratified "surplus" land sales on the Nez Perce reservation, Judge Wood thought the Supreme Court's 1998 decision controlled the Nez Perce water claim for off-reservation fishing grounds.[167]

The two cases involve fundamentally different issues. *Yankton Sioux* concerned the tribe's sovereign authority to regulate non-Indian land uses on what it erroneously thought was its reservation.[168] The Nez Perce, on the other hand, did not seek judicial recognition of regulatory authority, but instead sought recognition of the tribe's proprietary right to fish. The SRBA court confused the two issues, thereby failing to recognize that the controlling precedent was the Supreme Court's 1999 decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*.[169]

In *Mille Lacs*, the Court determined that an off-reservation treaty "'privilege of hunting, fishing, and gathering . . . during the pleasure of the President'"[170] survived: (1) an executive order attempting to remove the tribe from the lands it ceded to the United States;[171] (2) a subsequent treaty in which the tribe agreed to relinquish "all right, title, and interest" in all lands in the Minnesota territory;[172] and (3) Minnesota statehood.[173] The most relevant aspect of the *Mille Lacs* case to the Nez Perce situation was the cession of land in the subsequent treaty. Because that treaty made no mention of the hunting, fishing, and gathering rights reserved in the prior treaty, and because the tribe received no compensation for these rights, the Court concluded that the tribe would not have understood that it was relinquishing its reserved rights.[174] Therefore, the Court held that the purpose of the treaty was merely to transfer land to the United

165. *See* Yankton Sioux Tribe v. Southern Missouri Waste Management Dist., 890 F. Supp. 878 (D.S.D. 1995), *aff'd*, 99 F.3d 1439 (8th Cir. 1996), *rev'd sub. nom Yankton Sioux*, 522 U.S. 329. *See also* Judith V. Royster, *Of Surplus Lands and Landfills: The Case of the Yankton Sioux*, 43 S.D. L. REV. 283 (1998).

166. *See Yankton Sioux*, 522 U.S. 329, 358.

167. *See* Slip op., *supra* note 17, at 41-46.

168. *See Yankton Sioux*, 522 U.S. at 333.

169. 526 U.S. 172 (1999).

170. *Id.* at 177 (quoting 1837 Treaty with the Chippewa).

171. *See id.* at 193.

172. *Id.* at 195 (quoting 1855 Treaty with the Chippewa); *see also id.* at 202.

173. *See id.* at 208.

174. *See id.* at 184-86.

States, not to terminate the previously reserved usufructuary rights.[175] In short, since the treaty's conveyance of land title did not work an unambiguous termination of the tribe's hunting, fishing, and gathering rights, those rights continued despite the land transfer.[176]

The *Mille Lacs* decision demonstrates that the Nez Perce water rights — also usufructuary rights[177] — appurtenant to fishing grounds formerly on their reservation, should be unaffected by land cessions to the government — such as that ratified in the 1894 statute — which do not specifically mention those rights. The fact that the Nez Perce received monetary compensation under the 1894 statute for the surplus land sale is irrelevant. The monetary compensation the Nez Perce received was for the lands the tribe expressly conveyed, rather than for fishing rights not mentioned in the agreement. In *Mille Lacs*, the fact that the tribe received monetary compensation for its ceded lands did not prevent the Supreme Court from concluding that the tribe's unmentioned hunting rights survived.[178]

If anything, the Nez Perce fishing rights stand on firmer ground than the usufructuary rights in *Mille Lacs*. The Nez Perce rights are not defeasible "at the pleasure of the President," as are the *Mille Lacs* off-reservation rights.[179] Instead, the off-reservation fishing rights were intended to endure through the years. The Supreme Court determined this point nearly a century ago in the *Winans* case, when it held that the treaty fishing right was a servitude burdening all ceded lands.[180] The Court justified that decision in language that still resonates today:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and

175. *See id.* at 196.

176. *See id.* at 201-02.

177. *See* 6 THOMPSON, *supra* note 121, § 50.03(d), at 519-20; *see also* Robert E. Beck, *The Legal Regimes*, *in* WATERS AND WATER RIGHTS § 4.01, at 65 (Robert E. Beck ed., 1991).

178. *Mille Lacs*, 526 U.S. at 180 (noting the compensation for the ceded lands). The court also stated:

> The entire 1855 Treaty, in fact, is devoid of any language expressly mentioning — much less abrogating — usufructuary rights. Similarly, the Treaty contains no language providing money for the abrogation of previously held rights. These omissions are telling because the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights.

Id. at 195.

179. *See supra* note 170 and accompanying text.

180. United States v. Winans, 198 U.S. 371, 381 (1905).

> which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them — a reservation of those not granted.[181]

Whatever adjustments might be necessary to accommodate the Nez Perce Tribe's reserved off-reservation fishing rights to the conditions of the 21st century, the accommodation cannot involve denying the existence of water rights necessary to effectuate the fishing purpose of their century-and-half old treaty.

VIII. CONCLUSION

In 1983, in a decision that sanctioned state court determination of the existence, nature, and scope of Indian reserved water rights under the McCarran Amendment, Justice Brennan expressed optimism that the state courts would deal fairly with Indian water right claims. Justice Brennan noted that "our decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law."[182] The SRBA court's decision casts doubt on Justice Brennan's optimism about the justice that tribal water rights would receive in state courts.

If the 19th and early 20th century was an era in which tribes lost most of their lands through treaties and statutes like the Dawes Act, the 21st century may become the era in which the tribes lose their most precious remaining resource — their water rights — to state courts under the McCarran Amendment. The Idaho Supreme Court has the opportunity to prevent that era from beginning in Idaho by correcting the errors in the SRBA court's misguided opinion.[183]

IX. EPILOGUE

When we wrote that Judge Wood's opinion read more like an advocate's brief than a dispassionate judicial opinion,[184] we had no idea

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181. *Id.* at 380-81.

182. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983).

183. The Idaho Supreme Court might take note of the Arizona Supreme Court's example in *In re Gila River System & Source*, 989 P.2d 739 (Az. 1999), where the court ruled that tribal water rights could include groundwater, expressly rejecting the Wyoming Supreme Court's decision in *In re Big Horn System*, 753 P.2d 76, 99-100 (Wyo. 1988).

184. *See supra* note 82 and accompanying text.

how close to the mark we were. In February, 2000, a little over two months after Judge Wood's initial opinion rejecting the Nez Perce Tribe's off-reservation water right claims, the tribe asked Judge Wood to disqualify himself because both he and members of his family were in fact parties to the SRBA proceeding.[185] Judge Wood has groundwater claims for domestic uses and irrigation of thirteen acres.[186] His brother and two sisters also have water right claims subject to the SRBA; one sibling irrigates 62.8 acres.[187] His sister and brother-in-law also are members of a partnership which has irrigation and domestic claims at issue in the SRBA, and his brother-in-law is a shareholder in a corporation with domestic, power, and irrigation claims.[188]

Judge Wood disclosed none of these conflicts to the parties in the case until February 11, 2000 – four days after the tribe asked him to disqualify himself and roughly two and one-half months after his decision.[189] He had, however, apparently mentioned his water right claim to the Chief Justice of the Idaho Supreme Court before he was appointed presiding judge of the SRBA court.[190]

Under the Idaho Rules of Civil Procedure, a judge may be disqualified for cause if the judge "'is a party, or is interested in the action or proceeding,'" or because the judge "'is related to either party by consanguinity or affinity within the third degree. . . .'"[191] The tribe alleged that Judge Wood should have disqualified himself either because of his or his family's water right claims.[192]

In 1989, Justice Sandra Day O'Connor recused herself from *Wyoming v. United States*,[193] a case involving a basinwide adjudication to water rights of the Big Horn River Basin, when she discovered that her family's ranch, in which she was a minority stockholder, was party to an Indian water rights adjudication in Arizona. She disqualified

185. *See* Response to United States Motion For Status Conference and Order on Nez Perce Tribe's Motion To Set Aside All Decisions . . . and Motion to Disqualify Judge Wood at 3, *In re* SRBA, No. 39576, Subcase No. 03-10022, (Idaho Dist. Ct. Mar. 23, 2000) [hereinafter Refusal to Disqualify] (citing the tribe's motion to disqualify, filed on Feb. 7, 2000).

186. *See id.* at 17-18.

187. *See id.* at 19-20.

188. *See id.* at 21.

189. *See id.* at 3-4 (citing Judge Wood's disclosure of February 11, 2000 and a supplemental disclosure of February 28, 2000).

190. *See* Associated Press, *Water rights judge responds to tribe*, IDAHO STATESMAN, Feb. 18, 2000, at 10B (noting Judge Wood's claim that he discussed his water rights with Chief Justice Linda Copple Trout on Nov. 3, 1998).

191. *See* Refusal to Disqualify, *supra* note 185, at 9 (quoting IDAHO R. CIV. P. § 40(d)(2)(A)(1)-(2)).

192. *See id.* at 9-10.

193. 492 U.S. 406 (1989)

herself even though the case had been fully briefed and argued and the Justices had exchanged numerous draft opinions, and even though, as revealed by Justice Marshall's papers, Justice O'Connor was about to deliver a majority opinion in the case.[194] Her memorandum to the Court stated, "'For reasons which I will not detail here, I believe the ranch will succeed in being dismissed from the suit as having no affected interest, but as of now I believe I must disqualify myself in this case.'"[195] Recently, the several members of the Arizona Supreme Court followed Justice O'Connor's example and recused themselves from the Gila River adjudication.[196]

Judge Wood chose not to follow the examples of Justice O'Connor or the Arizona Supreme Court. Instead, on March 23, 2000, he rejected the tribe's motion to disqualify him, ruling that there was no direct conflict between his and his family's claims and those of the tribe and that any conflicts were "indirect, speculative and, at best, de minimus."[197] Judge Wood determined that there were no direct conflicts because his family's claims had been the subject of partial decrees issued by Judge Wood's predecessor, had not been challenged by the tribe, or had not as yet been reported by the Idaho Water Resources Department.[198] As for his own water right claims, Judge Wood opined that there was essentially no difference between his claim for domestic use and every other landowner served by a municipality within the area subject to the SRBA court's jurisdiction – eighty-seven percent of the state.[199] Thus, his stockwatering claim was, according to Judge Wood, *de minimus*.[200] And since his irrigation claim will not be reported until sometime in 2003, the judge ruled that any conflicts with the tribe were "remote and speculative."[201]

Judge Wood added that there could only be a conflict between the tribe's claims and his own and his family's if there were a water shortage, if his own groundwater claims were actually hydrologically connected with the tribe's claims, and if a delivery call of "unprecedented magnitude" were made.[202] Fundamentally, the court determined that his and his family's claims were just too small to make

194. *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1640-41 & nn.327-28 (1996); Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. COLO. L. REV. 683, 684-85 & n.10 (1997).

195. Mergen & Liu, *supra* note 194, at 685 n.10 (quoting Justice O'Connor).

196. *See supra* note 183.

197. Refusal to Disqualify, *supra* note 185, at 27-33.

198. *See id.* at 28, 32.

199. *See id.* at 28-29.

200. *See id.* at 28.

201. *Id.* at 32.

202. *Id.* at 35-37.

a difference:

> [I]n the overall scope of the SRBA, Judge Wood's claims, and the claims of his family members, are inconsequential. . . . [T]he SRBA encompasses more than three million acres of irrigated land. Judge Wood's irrigation right for ten acres represents a tiny fraction of the total irrigation claims. Surely this interest is *de minimus*. In sum, the speculative nature and indirectness of any perceived conflict is not sufficient grounds for disqualification.[203]

Judge Wood should have instead followed the precedents set by Justice O'Connor and the Arizona Supreme Court. Even if he is right that his and his family's claims are *de minimus*, faith in the impartiality of the judiciary depends not on technical definitions of direct versus indirect conflicts but on avoiding the appearance of unfairness. Judge Wood did not avoid this appearance. Since there is no exception in the Idaho Rules of Civil Procedure for *de minimus* conflicts,[204] the Idaho Supreme Court should overrule Judge Wood, disqualify him, and void his unfortunate decision on the merits.

203. *Id.* at 37.

204. *See supra* note 191 and accompanying text.